Office Supreme Court U. S.
FILED
MAR 19 1900
JAMES H. McKENNEY,
Clerk

No. 222.

Brf. of Williams for D. E. Tmo.

Filed Mar. 19, 1900.

In the Supreme Court of the United States

OCTOBER TERM, 1899.

No. 222.

GEO. S. WILLIAMS, PLAINTIFF IN ERROR,

versus

C. E. WINGO, DEFENDANT IN ERROR.

In Error from the Supreme Court of Appeals of the State of Virginia.

BRIEF FOR DEFENDANT IN ERROR.

MOTION TO DISMISS.

JOHN A. GOOK, PRINTER, WYTHEVILLE, VA.

In the Supreme Court of the United States

OCTOBER TERM, 1899.

No. 222.

GEO. S. WILLIAMS, PLAINTIFF IN ERROR,

versus

C. E. WINGO, DEFENDANT IN ERROR.

In Error from the Supreme Court of Appeals of the State of Virginia.

BRIEF FOR DEFENDANT IN ERROR.

MOTION TO DISMISS.

For the defendant in error, I move the court to dismiss this writ of error as having been improvidently awarded in this: That it does not appear from the printed record that there was any duly certified copy of the record from the State Courts presented to this court at the time of or before the granting of said writ. The writ was granted on December 10th, 1898; (see p. 20 of record.) The only certificate of the Clerk of the Supreme Court of Appeals, is to be found on page 17 of the printed record, and is dated the 11th day of February, 1899, more than two months after the writ was granted, and this certificate, on its face, shows that it was made after the writ was granted, and the court's attention is especially called to the fact that the petition to the Supreme Court of Appeals of Virginia, referred to in the order

of said court of date July 6th, 1898, does not appear in the printed record; (see p. 16 of printed record.) On behalf of the defendant in error, I applied to the Clerk of the Supreme Court of Appeals of Virginia, at Wytheville, for a copy of said petition for use in this case in this court, and was unable to obtain it, for the reason that it had been previously given out to W. J. Henson, of counsel for plaintiff in error.

See certificate to this effect furnished by the Clerk, and which is as follows :

VIRGINIA.

In the Supreme Court of Appeals, at Wytheville, this February 9th, 1900 :

This is to certify that, Judge Sam'l W. Williams, as counsel for C. E. Wingo, this day applied to me in my office, at Wytheville, Virginia, for a copy of the petition of Geo. S. Williams, to the Supreme Court of Appeals of Virginia, mentioned in the order of said court entered on the 6th day of July, 1898, in the case of said Geo. S. Williams, petitioner, vs. C. E. Wingo, and that I was unable to furnish him a copy of said petition, because the same is not on file in my office; because the same has been heretofore delivered to W. J. Henson, counsel for said C. E. Wingo, together with the original transcript of the record from the court below.

Given under my hand as Clerk of the Supreme Court of Appeals of Virginia, at Wytheville, this 9th day of February, 1900.

W. G. G. LOWRY,
Clerk.
By J. Norment Powell, Deputy Clerk.

The writ in this case should be dismissed, because it does not appear from the record that any of the questions necessary to give this Court jurisdiction were actually raised and passed upon by the State Court. In discussing this question, Professor Minor, in his Institutes, Vol. 4, p. 359, states the law to be : "Someone of the questions stated in the section must appear to *have actually arisen.* It is not sufficient that such a question *was involved.* It must appear to have been *actually* and *distinctly* raised." And to support

this proposition, he cites :

1st. Abb. U. S. Practice, 331;
Farney vs. Towle, 1st. Black, 350;
Hamilton & Co., vs. Massachusetts, 6 Wal., 332;
The Victory, 6 Wal., 382;
Parmalee vs. Lawrence, II Wal., 36;
Marquese vs. Bloom, 16 Wal., 351;
Murry vs. Charleston, 96 U. S., 442;

And on the same page, the author further says: "Some of the questions stated in the section must appear by *the record* to have been *decided by the State Court* in the manner contemplated." And for this proposition, he cites :

1st. Abb. U. S. Practice, 331;
William vs. Norris, 12 Wheat., 117;
Tarver vs. Keach, 15 Wal., 67;
R. L. Rhodes vs. Richmond, 15 Wal., 3;
Solomons vs. Graham, 15 Wal., 209;
Hall vs. Jordan, 15 Wal., 393;
Com. Bank vs. Rochester, 15 Wal., 639;
Stevenson vs. Williams, 19 Wal., 572;
Murry vs. City of Charleston, 96 U. S., 442.

It nowhere appears from the record that the question as to whether the Act of the Legislature, under which the County Court of Giles established the ferry in this case, was, or was not repugnant to the Constitution of the United States, was ever raised by any pleading or otherwise in any tangible way in the State Courts.

It nowhere appears in the record that any rights whatever under the Constitution of the United States was "specially set up or claimed" in the State Court, by the plaintiff in error, either by way of demurrer, plea or otherwise.

Chicago R. Co. vs. City of Chicago, 164 U. S., 454:
Oxly Statve Co. vs. Butler Co., 166 U. S., 648;
U. S. Rev. S., Sec. 709.

MERITS.

The Virginia Statutes in regard to the establishment of ferries, are plain and simple, and have been strictly complied with in this case, and no question in regard thereto can arise in this court. In the petition filed in this court, page 17 of printed record, the Statute on which the plaintiff in error seeks to base his claim in this court as the same now appears in the Virginia Code of 1887, is duly copied, but the history of this legislation is not given. This Statute was first passed March 5th, 1840; (see Acts of Assembly, 1839-40, p. 58,) and the Statute as thus passed, is as follows:

"An Act to Amend the Several Acts Concerning Ferries."

(Passed March 5th, 1840.)

"First. Be it enacted by the General Assembly that, it shall not be lawful for the court or any county to grant leave to establish a ferry over any water courses within one-half mile, in a direct line, of any other ferry legally established over the same water course; and if any person not having heretofore obtained lawful authority to do so, shall keep a public ferry over any water course within the distance aforesaid of another ferry, over the same water course legally established and regularly kept up, or shall keep a boat or boats, with assistants or ferrymen generally prepared and in attendance to carry persons, horses or carriages of any kind, including wagons and carts, and shall actually carry the same, or any of them, whether for reward or not, over any water course within one-half mile of any ferry which may at the time be legally established and regularly kept up over the same water course, every person so offending, shall, for every such offence, forfeit and pay the sum of two hundred dollars, to be recovered by action of debt, in the name and for the use of the proprietor or keeper of the ferry which shall be within the distance aforesaid, provided that the said penalty shall not be recoverable for the commission of such an offence, oftener than once in any one month, and that nothing herein contained shall be so construed as to prevent and person from

carrying the members of his own family or persons in his employment, and his own property across any water course in his own boats, or any merchant or miller from carrying free of toll, any person bona fide engaged in the actual transportation of grain, timber, or other produce, and necessarily accompanying the same, to or from his store or mill." This act has been in force in Virginia ever since its passage in substantially the same manner as it now appears in the Virginia Code.

The only ground on which the plaintiff in error seeks to rest his case in this court is that the judgment of the state court is repugnant to Sec. 10 of Art. 1 of the constitution of the U. S., which prohibits any state from passing any law impairing the obligation of contracts. It is respectfully submitted that before this question can properly arise in any case, the existence of a contract which can be, or has been impaired, must be clearly shown. No such contract has been shown in this case. No contractual relations whatever, has been shown to exist in this case between the plaintiff in error and the State of Virginia, or between the plaintiff in error or anyone else, touching the subject matter of controversy in this suit. That the statute referred to and relied on by counsel for plaintiff in error does not of its own force and effect create a contract, has been settled by this court in the case of Wheeling and Bellmont Bridge Co., vs. Wheeling Bridge Co., 138 U. S., 287-293. This case and the principles therein settled is confidently relied upon by the defendant in error as being conclusive of all questions raised, or even suggested, in the record of this case, and it is therefore not deemed necessary to enter into a detailed or lengthy reply to, or criticism of the many cases and authorities cited by plaintiff in error. Suffice it to say that upon a full and fair investigation it will be found that none of the cases or authorities cited, will in the least, shake the full binding force and authority of this case. As to the Virginia case of Somerville vs. Wimbush, 7 Grat. 231, commented on in the brief of counsel for plaintiff in error, it may be said that this case is authority for the position that the Virginia legislature has full power to establish a rival ferry in immediate juxtaposition with an existing ferry, and in this connection the attention of the court is called to the fact that the Virginia statute relied on by

plaintiff in error, does not even purport to be binding on the legislature, but only on the court, and by the very terms of the statute, leaving the legislature with full and unimpaired power to exercise all of its inherant powers in legislating on the subject.

Upon the whole case it is confidently submitted that there is no error in the record in this case and that the same should be affirmed.

SAM'L W. WILLIAMS,
For Defendant in error.